Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

COMERCIAL SAMORA LTDA.,

Petitioner,

V.

UNITED STATES OF AMERICA
and
BANCO ATLANTICO,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. WHETHER DUE TO NOT CONSIDERING THE EXPANDED AMENDED DEFINITION OF "INTERCEPT" AND "DEVICE" IN THE ELECTRONIC COMMUNICATION PRIVACY ACT OF 1986, 18 U.S.C. § 2510(4) AND (5), WHICH CONGRESS SPECIFICALLY ENACTED TO PROTECT ELECTRONIC COMMUNICATIONS, THE SECOND CIRCUIT ERRED WHEN IT USED THE LIMITED 1968 DEFINITION OF ONLY "INTERCEPT," SO TO APPROVE THE USE OF THE VERBAL ORDERS OF TWO NON-SENIOR LEVEL EMPLOYEES OF THE UNITED STATES, WHO DIRECTED THE PROGRAMMING OF "STOP QUES" IN BANCO ATLANTICO'S COMPUTER MODEM DEVICE TO STOP AND THEN PERMIT ACCESS TO ALL ELECTRONIC FUND TRANSFER COMMUNICATIONS IN TRANSIT TO THE REPUBLIC OF COLOMBIA?

II. WHETHER UNDER 18 U.S.C. § 2520, COMERCIAL SAMORA LTDA. HAS STATED A CLAIM FOR DAMAGES FOR VIOLATION OF 18 U.S.C. § 2516(3), DUE TO THE ADMITTED PROGRAMMING OF "STOP QUES" IN BANCO ATLANTICO'S COMPUTER MODEM DEVICE WHILE IT PROVIDED A COMMUNICATION SERVICE TO THE PUBLIC, SO TO PERMIT WITHOUT A JUDICIAL ORDER ISSUED IN ACCORDANCE WITH 18 U.S.C. § 2518, THE UNITED STATES ACCESS TO ALL ELECTRONIC FUND TRANSFER COMMUNICATIONS IN TRANSIT TO THE REPUBLIC OF COLOMBIA?

III. WHETHER UNDER 18 U.S.C. § 2707, COMERCIAL SAMORA LTDA. HAS STATED A CLAIM FOR DAMAGES BECAUSE WITHOUT A

WARRANT ISSUED UNDER THE FEDERAL RULES OF CRIMINAL PROCEDURE REQUIRED UNDER 18 U.S.C. § 2703(a), THEIR ELECTRONIC COMMUNICATIONS IN COMPUTER STORAGE WERE ADMITTEDLY DISCLOSED TO THE UNITED STATES?

IV. WHETHER COMERCIAL SAMORA LTDA., HAS STATED A CLAIM FOR DAMAGES UNDER THE RIGHT TO FINANCIAL PRIVACY ACT OF 1978, 12 U.S.C. § 3403(a), BECAUSE OF THE UNAUTHORIZED DISCLOSURE OF THEIR FINANCIAL INFORMATION STORED IN "STOP QUE" ACCOUNTS ESTABLISHED IN THEIR NAME AND THE RECEIPT BY BANCO ATLANTICO OF COMPENSATION UNDER THE ACT?

V. WHETHER THE SECOND CIRCUIT ERRED IN NOT GRANTING DAMAGES BECAUSE IT FAILED TO FIND THAT THE PROHIBITION AGAINST THE USE OF "GENERAL WARRANT" UNDER THE FOURTH AMENDMENT WAS VIOLATED BY THE UNITED STATES WHEN IT USED THE GENERAL IN REM WARRANT OF JULY 13, 1990, AND THE GENERAL DEA SUBPOENA OF JULY 20, 1990, REPEATEDLY STOP AND ACQUIRE ACCESS TO ALL THIRD PARTY ELECTRONIC FUND TRANSFERS GOING TO THE REPUBLIC OF COLOMBIA, AND CONDUCT A GENERAL SEARCH OF THE COMPUTER STORAGE OF BANCO ATLANTICO FOR ALL THIRD PARTY ELECTRONIC COMMUNICATION'S WHICH HAD GONE TO THE REPUBLIC OF COLOMBIA?

LIST OF PARTIES

In accordance Rule 11 and Rule 12.2 of the Rules of the Supreme Court of the United States, this petition seeks review on a writ of certiorari to the United States Court of Appeals for the Second Circuit of:

(i) the Second Circuit's denying the award of damages in its final decision in United States v. Merrill Lynch Bank, ___ F. 2d. ___, Docket No. 92-6229 (September 10, 1993); and,

(ii) the Second Circuit's not reinstating the related pending appeal in Manufacturas Internacional, Ltda. v. Manufacturers Hanover Trust Co., and Consolidated Cases, 792 F. Supp. 180 (February 27, 1992), 2nd Cir. No. 92-7360, in which there is no judgement, although involving identical facts and

similar statutory claims for damages that have already denied in the above final decision.

Although there is no judgement, review is warranted of these two appeals together, because of the recent denial of a motion to reinstate this appeal, despite the Stipulation of the parties, the Second Circuit's above cited final decision, and this Court's decision in United States v. 92 Buena Vista Avenue, 113 S.Ct. 1126 (1993).

The parties that have appeared in these two cases included those listed on the case caption.

As to the former of these actions that is a Government initiated civil forfeiture case, the parties below also included Organizacion JD Ltda., Manufacturas JD Ltda., Creaciones Viviana

Ltda., Comercial Estrella Ltda., Confecciones y Tejidos Nacionales Ltda., Manufacturas del Atlantico Ltda., Abuchaibe Hnos. Ltda., Manufacturas Internacionales Ltda., Industrias Marathon Ltda., Manufacturas de Moda Ltda; Incolco Ltda; Creaciones Karen Ltda; Tote Export Manufacturas Ltda; Creaciones Ivonne Ltda.; Confecciones Zuny Ltda., and Valery Fashions Ltda.

Comercial Samora has neither parent companies nor subsidiary companies.

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FOR THE UNAUTHORIZED PROGRAMMING OF "STOP QUES" IN COMPUTER MODEMS DEVICES AND FOR THE UNAUTHORIZED DISCLOSURE ELECTRONIC COMMUNICATION, IN VIOLATION OF THE MANDATES ENACTED BY CONGRESS IN THE ELECTRONIC COMMUNICATION PRIVACY ACT OF 1986 19

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PETITION FOR WRIT OF CERTIORARI

First, in United States v. Merrill Lynch Bank, 801 F.Supp 984 (1992), ___ F. 2d. ___, Docket No. 92-6229 (September 10, 1993) (hereinafter "All Funds

Case")(App. 1b)[1], where a final decision is rendered, this Petition for Writ of Certiorari seeks review the denial of Comercial Samora Ltda's (hereinafter "Samora")[2] claim for damages against the United States.

Second, this Petition also seeks review of the lower court's denial of Samora's claim for damages against Banco Atlantico in Manufacturas Internacional, Ltda. v. Manufacturers Hanover Trust Co., and Consolidated Cases, 792 F. Supp. 180 (February 27, 1992), appeal pending, 2nd Cir. Docket No. 92-7360

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[1]"App. " references are to the section and page number in the Appendix. "Lod. " references are to the page number in the Lodging filed and submitted with this Petition.

[2]The Limited Partnership is owned by one person, to fabricate and export finished clothing from Barranquilla, Republic of Colombia. It is incorporated under that Civil Code of the Republic, and has never conducted any commercial activity in the United States.

(hereinafter the "Consolidated Bank Cases")(App. 1d).

Deviation from the normal appellate process in the Consolidated Bank Cases is warranted because Samora's motion to reinstate their appeal was denied on October 14, 1993, by the Second Circuit pending the exhausting of any appeal to the Supreme Court in the All Funds Case, although both the All Funds Case (App. 1b) and United States v. 92 Buena Vista Avenue, 113 S.Ct 1126 (1993) (hereinafter "92 Buena Vista Avenue"), overruled Judge Jack B. Weinstein's use of the relation back doctrine to bar a claim against the United States for violations of the Electronic Communications Privacy Act, 18 U.S.C. § 2510 et seq. and § 2701 et seq.

Therefore because the repeated denying of Samora's right to reinstate the Consolidated Bank Cases effectively reconfirms the holding in the All Funds Case, Samora prays a writ of certiorari be issued so that this Court can provide discretionary supervisory review of these legal issues of such imperative public importance for which Congress enacted specific legislation permitting a claim for damages for the unauthorized procuring of the access to electronic communication in transit, and unauthorized disclosure of electronic communication in computer storage

CITATIONS TO OPINIONS BELOW

The opinion of the United States District Court for the Eastern District in the All Funds Case at App. 1a, is reported at 801 F. Supp. 984 (E.D.N.Y).

The opinion of the Court of Appeals in the All Funds Case, not yet reported, is reproduced in the separately bonded appendix to this petition at App. 1b.

The Order Denying the Petition for Rehearing dated October 6, 1993, is reproduced at App. 1c.

The opinion of the United States District Court for the Eastern District in the Consolidated Bank Case, at App. 1d, is reported at 792 F. Supp. 180 (1992) appeal pending.

STATEMENT OF JURISDICTION

The Second Circuit issued its opinion in the All Funds Case on September 10, 1993. It denied a petition for rehearing on October 6, 1993. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

In the Consolidated Bank Cases, where no judgment has been issued, and all motions to reinstate in accordance with a Stipulation have been denied, the jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1) and § 2101(e).

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

THE FOURTH AMENDMENT

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

THE ELECTRONIC COMMUNICATIONS PRIVACY ACT OF 1986

18 U.S.C. § 2510:

(4) "intercept" means the aural or other acquisition of the contents of any . . . electronic . . . communication through the use of any electronic, mechanical, or other device;

(5) "electronic, mechanical, or other device" means any device or apparatus which can be used to intercept a . . . electronic communication . . . .

(12) "electronic communication" means any transfer of . . . intelligence of any nature transmitted in whole or in part by wire . . . that affects interstate or foreign commerce, ...

(15) "electronic communication service" means any service which provides to users thereof the ability to send or receive . . . electronic communication.

(17) "electronic storage" means-

(A) any temporary, intermediate storage of a . . . electronic communication incidental to the electronic transmission thereof; and

(B) any storage of such communication by an electronic communication service for purposes of backup protection of such communication; . . .

18 U.S.C. § 2511(1)(a):

(1) Except as otherwise specifically provided in this chapter any person who-

(a) intentionally intercepts,. . . , or procures any other person to intercept . . . , any . . . electronic communication;

(b) intentionally discloses, . . . to any person the contents of any . . . electronic communication, knowing or

having reason to know that the information was obtained through interception of . . . electronic communication in violation of this subsection . . . shall be punished as in subsection (4) or shall be subject to suit as provided in subsection (5).

18 U.S.C. § 2511(3)(a):

Except as provided in paragraph (b) of this subsection, a person or entity providing an electronic communication service to the public shall not intentionally divulge the contents of any communication (other than one to such person or entity, or agent thereof) while in transmission on that service to any person or entity other than an addressee or intended recipient of such communication or an agent of such addressee or intended recipient.

18 U.S.C. § 2516(3):

Any attorney for the Government (as such term is defined for the purposes of the Federal Rules of Criminal Procedure) may authorize an application to a Federal judge of competent jurisdiction for, and such judge may grant, in conformity with section 2518 of this title, or order authorizing or approving the interception of electronic communication by an investigative or law enforcement officer having responsibility for the investigation of the offense as to which the application is made when such interception may provide or has provided evidence of any Federal felony.

18 U.S.C. § 2520:

(a) **In general.**-Except as provided in section 2511(2)(a)(ii), any person whose . . . electronic communication is intercepted, disclosed, or intentionally used in violation of this chapter may in a civil action recover from the person or entity which engaged in that violation such relief may be appropriate.

18 U.S.C. § 2702(a):

Prohibitions.- Except as provided in subsection (b)-(1) a person or entity providing an electronic communication service to the public shall not knowingly divulge to any person or entity the contents of a communication while in electronic storage by that service;. . .

18 U.S.C. § 2703:

REQUIREMENTS OF GOVERNMENT ACCESS.

(a) **Contents of electronic communications in electronic storage.**- A Government entity may require the disclosure by a provider of electronic communication service of the contents of an electronic communication, that is in electronic storage in an electronic communication system for one hundred and eighty days or less, only pursuant to a warrant issued under the Federal Rules of Criminal Procedures or equivalent State warrant. A government entity may require the disclosure by a provider of electronic communication service of the contents of an electronic communication system for more than one hundred and

eighty days by the means available under subsection (b) of this section.

(b) **Contents of electronic communications in a remote computing service.**- (1) A government entity may require a provider of remote computing service to disclose the contents of any electronic communication to which this paragraph is made applicable by paragraph (2) of this section-

> (A) without required notice to the subscriber or customer, if the government entity obtains a warrant issued under the Federal Rules of Criminal Procedure or equivalent State warrant; or
>
> (B) with prior notice from the government entity to the subscriber or customer if the government entity-
>
> (i) uses an administrative subpoena authorized by a Federal or State statute or a Federal or State grand jury or trial subpoena; or
>
> (ii) obtains a court order for such disclosure under subsection (d) of this section;

except that delayed notice may be given pursuant to section 2705 of this title.

18 U.S.C. § 2707:

(a) **Cause of action**- Except as provided in section 2703(e), any . . . customer aggrieved by any violation of this chapter in which the conduct con-

stituting the violation is engaged in with a knowing or intentional state of mind may, in a civil action, recover from the person or entity which engaged in that violation such relief as may be appropriate.

THE RIGHT TO FINANCIAL PRIVACY ACT OF 1978

12 U.S.C. § 3401:

(4) "person" means an individual or a partnership of five or fewer individuals;

(5) "customer" means any person or authorized representative of that person who utilized or is utilizing any service of a financial institution, or for whom a financial institution is acting or has acted as a fiduciary, in relation to an account maintained in the person's name.

12 U.S.C. § 3403:

(a) Release of records by financial institutions prohibited

No financial institution, or officer, employee, or agent or a financial institution, may provide to any Government authority access to or copies of, or the information contained in, the financial records of any customer except in accordance with the provisions of this chapter.

STATEMENT OF THE CASE

A. JURISDICTION BELOW

In both the All Funds Case and the Consolidated Bank Cases, Samora filed claims for damages based upon the provisions of 18 U.S.C. § 2510(9)(a), § 2520, and § 2710(c)(1); 12 U.S.C. § 3416; 28 U.S.C. § 1332(a)(1), § 2201 and § 2202.

Appellate jurisdiction is invoked pursuant to 28 U.S.C. 1291.

B. RELEVANT FACTS

On July 13, 1990, Assistant United States Attorneys for the Eastern District of New York, Mr. Arthur P. Hui and Mr. Gary R. Brown (hereinafter Messrs. Hui and Brown), ordered the distribution of copies of a general civil in rem warrant and complaint to all intermediary

banks[3] in the greater New York area, including Banco Atlantico.

This general warrant sought only the seizure of a bank account at Merrill Lynch in Columbus Ohio, and did not mention Samora, or any other electronic fund transfer going to the Republic of Colombia (Lod. 1).

On July 17, 1990, Messrs. Hui and Brown, issued verbal telephone orders to the Banco Atlantico to procure their collaboration as a provider of an electronic communication service within the Fedwire, SWIFT, and CHIPS electronic

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[3]All domestic and international electronic fund transfer communication must pass through a sender bank, various intermediary banks, and a beneficiary bank. They all are providing an "electronic communication service" 18 U.S.C. § 2510(15), to the public, as part of the FEDWIRE, SWIFT, and CHIPS, world-wide electronic communication fund transfer systems. This public service is of great domestic and international importance, as indicated by the fact that daily electronic fund transfers amount to over 1 trillion dollars being transferred world-wide.

communication systems, so on behalf of the United States perform general searches of all electronic fund communications to the Republic of Colombia, regardless of the intended beneficiary.

Based on these verbal instructions of Messrs. Hui and Brown, Banco Atlantico admitted to knowingly inserting "stop ques" in their computer communication modem devices so to intercept[4] all electronic funds transfer communications in transit to any third party beneficiary in the Republic of Colombia.

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[4]Although the term "freeze," was used by both the Intermediary Banks in their explanation of their handling of the electronic communication, and by the Second Circuit in their decision in the All Funds Case; research of the term "freeze," confirms that it has no meaning in the context of electronic communication technology.

Based on the admitted facts that there were repeated procuring of access to electronic communications in transit through the programming of "stop ques" in the Intermediary Banks modem devices, the requirements of the amended definition of "intercept" in 18 U.S.C. 2510(4) were satisfied. See 18 U.S.C. 2510(5).

Once the programmed "stop ques" had intercepted the electronic communications, and the messages were placed in computer storage, Banco Atlantico knowingly failed to comply with the instruction contained in the electronic fund transfer communication.

Thereafter based only on the verbal orders an electronic communication transferring $124,000.00, to Samora was intercepted at Banco Atlantico on July 18, 1990 (Lod. 2).

This in transit electronic communication was placed in computer storage at Banco Atlantico, and then disclosed to Messrs. Hui and Brown.

On August 8, 1990, three weeks after the procuring of the interception of the electronic communication based only on the verbal order of Messrs. Hui

and Brown, a Seventh Amended In Rem Complaint and DEA administrative subpoena in which Samora was captioned, were executed on Banco Atlantico (Lod. 3 and Lod. 4).

Samora filed both a verified claim for its funds, and claims against the United States for the unauthorized interception of the electronic communication, and disclosure of electronic communication information.

In June, 1991, under the authority of the Right to Financial Privacy Act of 1978, Banco Atlantico applied for and was compensated for its costs relating to its collaboration with the United States.

On July 18, 1991, Samora filed a claim against Banco Atlantico.[5]

From November, 1990, through March, 1992, during attempted discovery of the United States and the Banco Atlantico in the All Funds Case, Judge Weinstein first granted an ex parte stay from all discovery for over eight months to the United States; and then when the stay was lifted, denied discovery of both the United States, and Banco Atlantico.[6]

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[5]The Consolidated Bank Cases, was originally filed as ten separate actions in the Southern District of New York based on the transmit date of each distinct electronic communication belonging to Creaciones Viviana Ltda., Comercial Estrella Ltda., Confecciones y Tejidos Nacionales Ltda., Manufacturas del Atlantico Ltda., Abuchaibe Hnos. Ltda., Comercial Samora Ltda., Manufacturas Internacionales Ltda. and Industrias Marathon Ltda. Although motions in opposition were filed, the cases were consolidated and transferred to Judge Weinstein. Based on the relation back doctrine Judge Weinstein denied all discovery on the collaboration between Banco Atlantico and the United States.

[6]Since all discovery was denied, the exact number of electronic communications intercepted in transit to the Republic of Colombia is not

On February 22, 1992, after having also barred all discovery in the Consolidated Bank Cases Judge Weinstein granted Banco Atlantico its Motion for Summary Judgment.[7]

On March 3, 1992, one day before the start of the two month jury trial in the All Funds Case, based on his holding in the Consolidated Bank Cases, Judge Weinstein dismissed the claims against the United States.

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known. However, it is known that contrary to the regulations of the Federal Reserve, and the agreement entered into to be a part of the FEDWIRE, SWIFT and CHIPS electronic communication systems, Banco Atlantico neither notified the sender, the Federal Reserve, the beneficiary bank, nor any third party beneficiaries in the Republic of Colombia, that they would not comply with the instructions contained in the intercepted electronic communications.

[7]The claim for violation under the Electronic Communications Privacy Act was dismissed based on the relation-back doctrine. The claim under Right to Financial Privacy Act, was dismissed because the Court found, although permitting no discovery on the issue, that no "account" was held in the name of Samora as the intended beneficiary.

Due to the above decisions of Judge Weinstein, Samora withdrew its verified claim under the Admiralty Rules prior to the trial in the All Funds, and filed timely notice of appeals with the Second Circuit of the denial of its claims for damages in first the Consolidated Bank Cases, and then the All Funds Case.

REASONS FOR GRANTING THE WRIT

I. **REVIEW BY THIS COURT IS SOUGHT BECAUSE THE SECOND CIRCUIT'S DECISION TO USE THE OLD 1968 DEFINITION OF "INTERCEPT" AND "DEVICE" IN THE ALL FUNDS CASE, AND ITS FAILURE TO REINSTATE THE CONSOLIDATED BANK CASES, HAVE DENIED SAMORA THEIR RIGHT TO RECEIVE DAMAGES FOR THE UNAUTHORIZED PROGRAMMING OF "STOP QUES" IN COMPUTER MODEMS DEVICES AND FOR THE UNAUTHORIZED DISCLOSURE ELECTRONIC COMMUNICATION, IN VIOLATION OF THE MANDATES ENACTED BY CONGRESS IN THE ELECTRONIC COMMUNICATION PRIVACY ACT OF 1986.**

The Second Circuit's decision to not reinstate the Consolidated Bank Cases, and its decision in the All Funds

Case, are in direct conflict with mandates of Congress regarding the protection of "electronic communications" in transit and in computer storage.[8]

Prior to 1986, Congress and others were concerned that modern communication modes, and their future development, such as electronic fund transfers and other computer messaging, might be constitutionally less confidential than older methods.

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[8]Senator Pat Leahy wrote to the then Attorney General on the issue of the protection of information in electronic communication. See Electronics Communications Privacy Act of 1986, Senate Report No. 99-541, October 17, 1986, p. 3557 (hereinafter "Senate Report"). See also Electronic Communication Privacy Act of 1986, House Report No. 99-647, June 19, 1986, Committee on the Judiciary, 99th Congress (hereinafter "House Report").

The Senate Report, p. 3555, states, "[t]he Electronic Communications Privacy Act amends title III of the Omnibus Crime Control and Safe Streets Act of 1968-the Federal wiretap law-to protect against the unauthorized interception of electronic communications. The bill amends the 1968 law to update and clarify Federal privacy protection and standards in light of dramatic changes in new computer and telecommunications technologies."

There were three possible Fourth Amendment arguments advanced to justify warrantless searches of computer messages, or records thereof, under the control of a third-party computer service provider:

1. The user disclosed their messages to the third party, as the customer in United States v. Miller, 425 U.S. 435 (1976), who disclosed his financial information to the bank, and thereby assumed the risk that the third party would disclose them to the government.

2. The third party's ability to access the user's messages deprived the user of any legitimate expectation of privacy, as happened in Smith v. Maryland, 442 U.S. 735 (1979).

3. The third party has power to consent to a search because it has "con-

current authority" over the records, as happened in United States v. Matlock, 415 U.S. 164 (1974).

To specifically clarify the existence of and limits to the confidentiality rights of electronic messages, Congress amended Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510 et seq., by enacting the Electronic Communications Privacy Act of 1986, 18 U.S.C. §§ 2510 et seq., and §§ 2701 et seq.

This precise legislation was enacted to prevent the interception "or other acquisition,"[9] of the contents of elec-

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[9]Prior to the 1986, the term "intercept" was limited to "aural acquisition," but with the enactment of amended 18 U.S.C. § 2510(4), Congress obtained a "fair balance between the privacy expectations of citizens and the legitimate needs of law enforcement." House Report at p. 19.

tronic funds transfer communications,[10] and to clarify the existence of and limits to the confidentiality rights of these electronic messages in transit and computer storage, vis-a-vis the Government and an electronic communication service provider.[11]

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[10]An "electronic funds transfer communications" is the transmittal of financial information between banks via computer or other electronic messages. Because Fedwire, CHIPS, and SWIFT systems are communication service providers, electronic funds transfers in transit and storage on these systems are protected communications under 18 U.S.C. § 2516(3), and § 2703(a). See also House Report at p. 23.

[11]"The purpose of the legislation is to . . . to prohibit the interception of certain electronic communications; to provide procedures for the interception of electronic communications by federal law enforcement officers; to provide procedures for access to communications records by federal law enforcement officers; to provide procedures for federal law enforcement access to electronically stored communications; and to ease certain procedural requirements for interception of wire communications by federal law enforcement officers." House Report, at p.16.

"In the absence of market discipline, there is no presumption that the government will strike an appropriate balance between disclosure and confidentiality. And the enormous power of the government makes potential consequences of its snooping far more ominous than those of . . .private individual or firm."Id. at p. 19.

The amendments accomplish the following:[12]

i. they expand the definition of the term "intercept" to include the obtaining access of electronic communication. 18 U.S.C. § 2510(4).

ii. they expand the definition of the term "device" to include any device or apparatus that could intercept an electronic communication. 18 U.S. C. § 2510(5).

iii. they prohibit the intentional and unauthorized interception of an electronic communication in trans-

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[12]In short the Electronic Communications Privacy Act, mooted arguments (1) and (2) above (insofar as they pertain to private messages in transit and short term records thereof) but left number (3) largely intact, if certain requirements were met. See Chapter 19, Confidentiality and Control of Data, at p. 361 to p. 386, of Benjamin Wright, The Law of Electronic Commerce EDI, Fax, and E-mail: Technology, Proof, and Liability, November, 1991, Little, Brown and Company; See also Note, Search Warrants and Computer Records, 67 B.U.L. Rev. 179 (1987).

mission, and the knowing disclosure or use of a communication so intercepted. 18 U.S.C. § 2511(1)(a) and (c);

iv. they prohibit a communications service provider from intentionally and illegitimately disclosing an electronic communication in transmission. 18 U.S.C. § 2511(3)(a);[13]

v. they prohibit access by both the federal and state governments to stored electronic messages and service providers transactional records. 18 U.S.C. §§ 2703(a); and

vi. they prohibit the unauthorized access to stored electronic communications. 18 U.S.C. § 2702(a).

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[13]Under the Federal Communications Act of 1934, 47 U.S.C. § 605 (1988), the ability of a communication service provider from divulging messages is also prohibited.

Turning to the All Funds Case decision, in complete disregard of these specific protection the Second Circuit denied Samora's claim for damages based on it applying the limited old 1968 definition of "intercept" and "device," and intentionally not using the expanded 1986 amended definition in 18 U.S.C. § 2510(4) and (5), so to approve of the use of verbal orders issued by low level Department of Justice employees,[14] to procure the interception and disclosure of Samora's in transit electronic communication.

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[14]In 1986, the Department of Justice, wrote to Congress to confirm that it agreed that for three years following enactment, it would require that the same senior level of authority as in 18 U.S.C. § 2516(1) (i.e. Deputy Assistant Attorney General of Criminal Division or higher), be required to seek judicial authority to access electronic communication in transit under 18 U.S.C. § 2516(3). Furthermore, the Department of Justice promised to provide 90 days notice to Congress of any change in this regulation. Senate Report at p. 3682 ; House Report at p. 51.

Thus in this manner the Second Circuit held that interception did not occur despite the admitted programming of "stop ques" in Banco Atlantico's computer modem devices.[15]

More interestingly, as well as far more troubling, was the Second Circuit's total ignoring of the specific Congressional prohibitions against "disclosure" contained in 18 U.S.C. § 2511(1)(a), (c), and (3)(a); § 2702(a).

By ignoring these and other statutory prohibitions, the Second Circuit assumed away the admitted use of only

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[15]A `modem,' (modulator/demodulator), has been defined as ". . . a device used to permit communications between computers at different sites, or between a computer and remote terminal, by converting binary digital computer data into analog signals which can pass over telephone lines. Rixon, Inc. v. Racal-Milgo, Inc., D.C. Del, 551 F.Supp. 163, 169." Vol 27, Words and Phrases, Permanent Edition, West Pub. 1989 Supp. Thus under 18 U.S.C. § 2510(5), a device was used by the Intermediary Banks at the request of the United States.

the verbal order issued by the two low level employees of the United States to acquire access to Samora's electronic communication stored in Banco Atlantico's computer storage for less than 180 days, in violation of 18 U.S.C. § 2516(3), and § 2703(a)[16].

Therefor the Second Circuit decision in the All Funds Case, is in error and must be reversed because:

First, by focusing on the old limited 1968 definition of the term "intercepts," and "device," the Second Circuit intentionally disregarded the new expanded 1986 definition which Congress specifically enacted to restrict the procuring of the interception of elec-

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[16]Under 18 U.S.C. § 2703(a), access Samora's electronic funds transfer communication could only be obtained through a judicial warrant issued under the Federal Rules of Criminal Procedure.

tronic communication in this new age of computer technology. 18 U.S.C. § 2510(4) and (5);

Second, the Second Circuit totally ignored the admitted facts that based only on verbal order, and without any judicial authority as required by 18 U.S.C. § 2516(3) and the regulations of the Department of Justice, or a warrant issued under the Federal Rules of Criminal Procedure, 18 U.S.C. § 2703(a), "stop ques' were programmed by Banco Atlantico in their computer modem devices to monitor and acquire access to all electronic fund transfer communications going to the Republic of Colombia.

Third, Second Circuit totally ignored the prohibition in 18 U.S.C. § 2511(1)(a), against one who "<u>procures</u>

any other person to intercept" an electronic communication;

Fourth, the Second Circuit totally ignored the prohibition against a person or entity who "intentionally discloses, to any person the contents of any electronic communication" in 18 U.S.C. § 2511(1)(c);

Fifth, the Second Circuit totally ignored the statutory prohibition against "a person or entity providing an electronic communication service to the public shall not intentionally divulge the contents of any communication" in 18 U.S.C. § 2511 (3)(a); and,

Sixth, totally ignored the statutory prohibition against an "entity providing an electronic communication service to the public [who] knowingly divulge to any person or entity the con-

tents of a communication while in electronic storage by that service," 18 U.S.C. § 2702(a).

It is for these reasons that this Petition presents issues of imperative public importance so that deviation from normal appellate practice is required to review both the All Funds Case final decision, with the pending appeal in the Consolidated Bank Cases.

II. REVIEW BY THIS COURT IS SOUGHT BECAUSE THE SECOND CIRCUIT'S DECISION IN THE ALL FUNDS CASE, AND ITS FAILURE TO REINSTATE THE CONSOLIDATED BANK CASES, HAVE DENIED SAMORA THEIR RIGHT TO RECEIVE DAMAGES UNDER THE RIGHT TO FINANCIAL PRIVACY ACT OF 1978.

Banco Atlantico has admitted that it had placed the funds relating to each intercepted electronic funds transfer in an account in the name of a beneficiary.

Also Banco Atlantico does admit to being compensated by the United States

under the provisions of the Right to Financial Privacy Act, for the expenses they incurred in their collaboration.

Despite these admitted facts, and the fact that discovery was barred by the District Court, the Second Circuit held in the All Funds Case, that 12 U.S.C. § 3403(a), is not applicable because Samora is not a "customer" of Banco Atlantico.

Samora argues that liability does exist under the Right to Financial Privacy Act not only because Banco Atlantico admitted that they placed the intercepted electronic fund transfers in a "stop que" account in their computer storage;[17] but also because Banco Atl-

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[17]The accounts had to be setup in accordance with the regulations of the Fedwire, SWIFT, and CHIPS systems. Said regulations requires that each electronic funds transfer which is delayed be maintained in a separate and distinct account

antico was compensated for the expenses relating to their collaboration under the Right to Financial Privacy Act.

Because of the above admissions this Court should grant this Petition for Writ of Certiorari so to reverse the Second Circuit.

III. THE REFUSAL TO REINSTATE THE CONSOLIDATED BANK CASES APPEAL WARRANTS REVIEW AT THIS TIME BECAUSE THE SECOND CIRCUIT HAS ALREADY DECIDED IN THE ALL FUNDS CASE TO CONDONE THE UNITED STATES AND BANCO ATLANTICO'S DISREGARD OF THE PROVISIONS OF THE ELECTRONIC COMMUNICATION PRIVACY ACT AND RIGHT TO FINANCIAL PRIVACY ACT.

In support of their motion to dismiss under Rule 12(b)(6), the United State and Banco Atlantico admitted that between July 16, 1990, and August 8,

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apart from all others transfers. Also the spurious inference in the Second Circuit's opinion that the Limited Partnerships are not "partnerships" for purposes of the act disregards the Republic of Colombia Civil Code, and Section 101(7) of the Uniform Limited Partnership Act.

1990, Messrs. Hui and Brown, without any judicial authority required under 18 U.S.C. § 2516(3) and § 2703(a), did instruct Banco Atlantico to:

(i) program "stop ques" in their computer modem devices, and not to comply with any accepted wire transfer instructions contained in any wire transfer going to the Republic of Colombia;

(ii) permit repeated unauthorized disclosure of accepted wire transfer instructions in transit to the Republic of Colombia, and in computer storage; and,

(iii) place into a "stop que" account at their respective banks the information related to intercepted wire transfer communications.

Despite these admissions of programming of "stop ques," and the repeated "disclosure" of electronic communica-

tion information by Banco Atlantico,[18] the Second Circuit in the All Funds Case, denied Samora claim for damages.

However from the admitted facts liability of the United States and Banco Atlantico exists because they did exactly what was specifically prohibited.

Consequently, because of the importance of the issues involved given the admissions of the United States and Intermediary Bank, the Second Circuit's decision in the All Funds Case, and its not issuing a decision in the Consolidated Bank Cases, the Court is requested to exercise its power of supervision to consider the Consolidated Bank Cases.

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[18]The Senate Report at p. 3580. stated that, ". . . the Electronic Communications Privacy Act amends existing section 2520 of title 18 of the United States Code to incorporate violations involving . . . , **disclosure** . . . of . . . electronic communications.

IV. THE IN REM WARRANT OF JULY 13, 1990, WAS A PROHIBITED GENERAL WARRANT WHICH VIOLATED THE FOURTH AMENDMENT, THUS DAMAGES SHOULD BE ALLOWED.

In Coolidge v. New Hampshire, 403 U.S. 443, 467, 91 S.Ct. 2022, 2038, 29 L.Ed.2d 564 (1971), reh. denied., 404 U.S. 874, this Court noted:

> Here, the specific evil is the "general warrant" abhorred by the colonists, and the problem is not that of intrusion per se, but of a general, exploratory rummaging in a person's belongings.

Similarly, in Maryland v. Garrison, 480 U.S. 79, 94 L.Ed. 72, 107 S.Ct. 1013 (1987), the Court held that, "[t]he manifest purpose of this particular requirement was to prevent general searches." Id. at 480 U.S. 84.

In this case on July 13, 1990, so to permit Messrs. Hui and Brown to rummage through every third party electronic funds transfer going to the Republic

of Colombia, an overbroad general in rem warrant issued to Banco Atlantico, with verbal order to stop by the use of "stop ques" these electronic communications.

Thus the general in rem warrant of July 13, 1993, was in violation of the Fourth Amendment, and damages should be allowed.

In Berger v. New York, 388 U.S. 41, 87 S.Ct. 1873, 18 L.Ed.2d 1040 (1967), this Court held that the New York State wiretapping statute was overbroad and therefore violated the Fourth Amendment because:

> [T]he statute's failure to describe with particularity the conversations sought gives the officer a roving commission to "seize" any and all conversations . . . . As with general warrants this leaves too much to the discretion of the officer executing the order. Secondly, authorization of eavesdropping for a two-month period is the equivalent of a series of intrusions, searches, and seizures pur-

> suant to a single showing of probable cause. . . . Third, the statute places no termination date on the eavesdrop once the conversation sought is seized. This is left entirely in the discretion of the officer. . . . Nor does the statute provide for a return on the warrant thereby leaving full discretion in the officer as to the use of seized conversations of innocent as well as quilty parties. In short, the statutes's blanket grant of permission to eavesdrop is without adequate judicial supervision or protective procedures. Id. at 388 U.S. 58-60

Each of these abuses were employed to stop the electronic communication of Samora:

a. the communication stopped by the programming of "stop ques" were not described in the July 13, 1990 in rem warrant;[19]

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[19]Samora was named for the first time in the in rem warrant executed three weeks later on August 8, 1990. The funds seized were never "described with particularity."

b. the search of Banco Atlantico computer storage of electronic funds transfers covered the period of over 180 days, from January, 1990 through September, 1990;

c. Messrs. Hui and Brown had "full discretion" as to which electronic fund transfer to permit Banco Atlantico to transmit.

This use of the July 13, 1990, in rem warrant cannot be permitted, and in addition to excluding any evidence obtained by the general warrant, damages, including cost and attorney fees should be awarded.

CONCLUSION

Through the use of only a self executing general *in rem* warrant, and verbal telephone orders, the United States did knowingly procure the collaboration of Banco Atlantico, in the programming of "stop ques" in its communication computer modem devices, so to acquire access to the information in the in transit electronic funds transfer communications of Samora, and disclose Samora's electronic communication information in computer storage.

Because these activities violated the protection given by Congress to "electronic communications" and "financial information," Samora have stated a claim for damages.

However, in the *All Funds Case*, due to the Second Circuit's conflicting

policy position from that of the legislation enacted by Congress, the Second Circuit refused to permit Samora's claims for damages.

The Second Circuit justified its position by finding, although no discovery was permitted in the lower court on the issue of "intercept," "device," and "disclosure," that a "device" was not used by the United States to "intercept," Samora's electronic communication.

The Second Circuit's decision is not only in serious error, but more disturbingly is drafted to disregard totally the precise statutory language Congress specifically enacted in 1986 to protect electronic communication:

- o 18 U.S.C. § 2510(4) and (5);
- o 18 U.S.C. § 2516(3);

- o 18 U.S.C. § 2511(1)(a) and (c);
- o 18 U.S.C. § 2511(3)(a);
- o 18 U.S.C. § 2703(a); and,
- o 12 U.S.C. § 3403(a).

This willingness of the Second Circuit to look the other way when there are repeated admitted violations of federal statutes, so to deny a right to recover for damages of Samora, brings to mind the following colloquy that has been attributed to the great Chancellor, Sir Thomas More:

Roper: So! Now you give the Devil benefit of law!

More: Yes. What would you do, cut a great road through the law to get after the Devil?

Roper: Yes! I'd cut down every law in England to do that!

More: Oh? And when the last law was down and the Devil turned round on you, where would you hide, Roper, the laws all being flat?

* * *

> Yes, I give the Devil benefit of law for my own safety's sake.

Robert Bolt, "A Man for All Season."

Whether or not the words be the historical More's or only the playwright's, the insight is both profound, and serves as the foundation for requesting this Court to issue a writ of certiorari to the Second Circuit.

The two appeals must be reviewed by this Court not only to reverse the lower courts so to rein in their misguided enthusiasm to use the forfeiture laws to hack that great road through precise legislation recently enacted by Congress to protect electronic communications; but also to provide supervisory guidance to the federal courts in the enforcement of the Electronic Communication Privacy

Act and the Right to Financial Privacy Act.

Respectfully submitted,

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